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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN TROY STURGES,

Defendant and Appellant.

F043572

(Super. Ct. No. 1053829)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Lora Fox Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Janis Shank McLean and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Dibiaso, Acting P.J., Buckley, J., and Dawson, J.

A jury convicted appellant, Ryan Troy Sturges, of second degree burglary (Pen. Code, § 460, subd. (b)).<sup>1</sup> In a separate proceeding, the court found true a prior prison term enhancement (§ 667, subd. (b)) and allegations that Sturges had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)). On June 11, 2003, the court sentenced appellant to an aggregate five-year term as follows: the middle term of two years, doubled to four years because of the prior strike conviction, and a one-year prior prison term enhancement. On appeal, Sturges contends he was denied the effective assistance of counsel by his defense counsel's failure to object to certain evidence. We will affirm.

### **FACTS**

Michael Gates testified that on February 9, 2003, at approximately 3:55 a.m. he and Joey Kaiser arrived in Gates's truck at Kaiser's duplex in Modesto from a fishing trip. The duplex was located on a cul-de-sac. Before going inside, Gates activated his alarm, which automatically locked the doors. Gates left fishing poles, a tackle box, a citizen's band radio, and the removable cover to his truck's stereo in the cab of the truck.

At approximately 4:05 a.m., the alarm in Gates's truck went off and he and Kaiser went to investigate. Gates saw that the wing window of his truck had been pushed open, the driver's door window was rolled almost completely down, and the driver's door was wide open. Gates also saw two men, later identified as Sturges and Brandon Womack, approximately 50 feet from the truck running away.

As Kaiser ran after the men, Gates got into his truck and followed them. At one point, the two men hid behind some bushes but ran off before Gates and Kaiser could restrain them. Eventually, Sturges ran into his father's house located approximately three

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

and a half blocks away from Kaiser's house while Womack was detained on the street by Kaiser and Gates.<sup>2</sup>

Kaiser testified that when Sturges and Womack came out from behind the bushes, Sturges swung a large flashlight at Kaiser before running away.

Modesto Police Officer Brian Kleiber testified that on February 9, 2003, at approximately 5:30 a.m. he and his partner responded to a disturbance call. When he arrived on the scene, Gates, Kaiser, and Womack were standing in the street. After Sturges came out of his father's house, Kleiber's partner placed him in handcuffs. During a postarrest interview Sturges stated that he was walking by Gates's truck, that he stopped to urinate because he had been drinking, and that the truck's alarm went off when he brushed against the truck.

During cross-examination, defense counsel elicited from Kleiber that Womack told him that he and Sturges were leaving a convenience store when the truck's alarm went off and that Womack's and Sturges's stories differed with respect to who left the store first. However, Kleiber did not check with the convenience store to see if they had a video tape showing Sturges and Womack in the store that morning, which could have helped him determine whether either one of them was telling the truth.

On redirect examination, the prosecutor asked Kleiber how Sturges's and Womack's stories varied and he testified that they varied with respect to who left the convenience store first. When the prosecutor asked Kleiber what Womack said, Kleiber testified as follows, without objection:

“He said [Sturges] left shortly before he did and when he caught up to . . . [Sturges], [Sturges] . . . was at the truck with the alarm going off and began running from it, so he began running as well, and while they were

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<sup>2</sup> Gates's testimony established that Sturges and Womack ran out of the cul-de-sac where Kaiser lived, then right for three blocks and then left onto a dead end street where Sturges's father lived.

running, he asked [Sturges] why they were running and [Sturges] told him because he was trying to steal something.”

On recross-examination defense counsel elicited from Kleiber that he did not know how reliable Womack was and that he had no way of knowing whether Womack told him the truth.

Sturges’s father testified that he was in his house getting ready to go to work when he heard noise outside. He then looked outside, saw his son, and told him to get inside. Sturges’s father subsequently went outside and asked Womack who had broken into the truck and Womack apologized and said he had.

On February 11, 2003, Womack called Sturges’s father and again apologized. He also stated that he was going to turn himself in and say he opened the door and did everything so he could get Sturges released.

Kleiber testified in rebuttal that Sturges’s father never told him about Womack’s alleged February 9, 2003, statement to him.

### **DISCUSSION**

Sturges contends that he was denied the effective assistance of counsel by his defense counsel’s failure to object to Womack’s statement to Officer Kleiber on hearsay grounds. Sturges further contends that the introduction of this statement prejudiced him because it prevented him from getting an instruction on auto tampering. We will reject these contentions.

“To prevail on a claim of ineffective assistance of counsel, the defendant must establish both ‘(1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted.’ [Citation, italics omitted.] As to the prejudice component, the California Supreme Court has held that a ‘ “reasonable probability is a probability sufficient to undermine confidence in the outcome” ’ of the prosecution. [Citation.]

“ ‘If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.’ [Citation.] ‘ “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” ’ [Citation.] ‘A court reviewing the conduct of counsel must in hindsight give great deference to counsel’s tactical decisions. [Citation.]’ [Citation.]” (*People v. Johnson* (2003) 114 Cal.App.4th 284, 301.)

We need not determine whether defense counsel provided deficient representation by his failure to object to Womack’s statement to Officer Kleiber because his failure to do so was harmless.

Evidence Code section 356 provides:

“Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

Here defense counsel elicited from Kleiber that Womack told him that he and Sturges were leaving a convenience store when the truck’s alarm went off and that Womack’s and Sturges’s accounts varied with respect to who left the convenience store first. Therefore, Evidence Code section 356 entitled the prosecutor to admit the remainder of Kleiber’s conversation with Womack including Sturges’s alleged admission to Womack that “he [Sturges] was trying to steal something.”<sup>3</sup>

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<sup>3</sup> In his reply brief Sturges for the first time contends that Kleiber’s testimony regarding Womack’s statements to him was objectionable on the ground that it was not responsive to the prosecutor’s questions. (See Evid. Code, § 766.) Thus, according to Sturges, his defense counsel was also ineffective for not objecting to this testimony on this basis as well. We have reviewed the transcript of Kleiber’s testimony and find that there is no merit to this contention because Kleiber’s testimony was responsive to the prosecutor’s questions.

Moreover, any error in admitting this evidence was harmless. During closing arguments defense counsel argued that Sturges and Womack went to a convenience store near where Gates's truck was parked, that Womack left the convenience store before Sturges, that Womack broke into the truck while Sturges caught up to him, and that both men ran when Gates and Kaiser came out of Kaiser's house. However, the defense theory was contradicted by Sturges's statement to Officer Kleiber that he stopped by Gates's truck to urinate and set off the truck's alarm by leaning on it. It was also undermined by the failure of the defense to explain why Sturges and Womack went to the convenience store so early in the morning and by Sturges's possession of a flashlight, which he could use to burglarize vehicles. Additionally, the jury could reasonably find that Sturges lied to Officer Kleiber and that this reflected a consciousness of guilt. (CALJIC No. 2.03.) It could also find that Sturges exhibited a consciousness of guilt when he ran away after the truck's alarm sounded. (CALJIC No. 2.52.) In view of these circumstances we find that it is unlikely Sturges would have received a more favorable result even if defense counsel had been successful in preventing Womack's statement to Officer Kleiber from being introduced into evidence.

We also reject Sturges's contention that introduction of Womack's statement prevented him from having the jury instructed on auto tampering. According to Sturges, Womack's statement was the only evidence that Sturges had the requisite intent to commit a theft (see CALJIC No. 14.58) when he broke into Gates's truck. Thus, according to Sturges, if Womack's statement had not been introduced into evidence the record would not have contained any evidence on one of the elements of auto burglary, which would have entitled him to an instruction on the lesser-included offense of auto tampering. Sturges is wrong.

“ [T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to

merit consideration” by the jury. [Citations.] “Substantial evidence” in this context is “ ‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’ ” that the lesser offense, but not the greater, was committed. [Citations.]’ [Citation.]” (*People v. Hughes* (2002) 27 Cal.4th 287, 366-367.)

Burglary requires an intent to commit a theft (or any felony) at the time entry is made. (See, e.g., CALJIC No. 14.58.)

“[T]he intent required for robbery and burglary is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime.” (*People v. Lewis* (2001) 25 Cal.4th 610, 643.)

The jury could reasonably infer that Sturges broke into Gates’s truck with the requisite intent from: 1) his possession of a flashlight which he could use to examine vehicles for property to steal; 2) his actions in breaking into a locked truck in the early morning when the owner was likely to be asleep; 3) his selection of a vehicle that was parked outside the most direct route from the convenience store to his father’s house and which had property in the cab that could readily be stolen; and 4) from the consciousness of guilt he exhibited when he lied to Officer Kleiber and when he fled from the scene. Thus, the record contains other evidence besides Womack’s statement to Officer Kleiber that supports a finding that Sturges had the intent to steal when he broke into Gates’s truck. Further, since nothing about the evidence tended to show that Sturges intended only to tamper with Gates’s truck, Sturges would not have been entitled to an instruction on auto tampering, even if Womack’s statement to Kleiber had been excluded. Accordingly, we reject Sturges’s ineffective assistance of counsel claim because he was not prejudiced by the introduction of this statement.

### **DISPOSITION**

The judgment is affirmed.